NO. 47764-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRESNEL WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty Ann van Doornink, Judge

No. 14-1-03422-1

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant has met his burden to show prosecutorial error that was flagrant, ill-intentioned, and could not have been cured by an instruction to the jury?

2. Whether defendant has met his burden of showing defense counsel's performance was deficient and that he was prejudiced by any deficiency?

B. STATEMENT OF THE CASE.

1. Procedural History

On September 2, 2014, the Pierce County Prosecutor's Office (State) charged Fresnel Francois Williams (defendant) with one count of domestic violence court order violation and one count of felony harassment, both with the aggravating circumstances that the current offense was a violent offense and defendant knew that the victim was pregnant. CP 1-2. On June 9, 2015, the State amended the information as to the aggravating circumstances on both counts, replacing those in the original information with the aggravating circumstances that defendant has committed multiple current offenses and his high offender score will result in some of the current offenses going unpunished. CP 34-35.

Following trial, a jury found defendant guilty of felony violation of a court order but could not reach a verdict on the felony harassment charge. CP 93, 97. The special verdict form regarding whether the crime was domestic violence related was not filled out; the jury had not finished deliberating when the verdict was read for count one. CP 94; 6/26/15RP 3. The trial court elected to leave the verdict as it was read without the special verdict form. 3RP 155.

Defendant was sentenced to a standard range sentence. CP 115. He filed a timely notice of appeal on June 26, 2015. CP 121.

2. Substantive Facts

On August 29, 2014, Bethany Stevens, who was nine months pregnant, went to a medical appointment at MultiCare OB/GYN Clinic on M.L.K. Jr. Way in Tacoma, Washington. 1&2RP 39, 42, 55. When Ms. Stevens arrived, defendant was there waiting for her. 1&2RP at 40. Ms. Stevens had a current No Contact Order against defendant in effect. 1&2RP at 40-41, 58. Despite the order, defendant contacted Ms. Stevens and followed her into MultiCare. 1&2RP at 42. Ms. Stevens asked defendant to leave. 1&2RP at 42. Defendant made threats to hurt Ms. Stevens and her baby, which she reported to the responding officer. 1&2RP at 44, 67.

Valerie Goodenough was working as a receptionist at the MultiCare OB/GYN Clinic on August 29, 2014. 1&2RP 87-88. Ms. Goodenough had seen Ms. Stevens there before and recognized her as a patient at the clinic when Ms. Stevens came in that day. 1&2RP at 88. Ms. Goodenough saw a "[y]oung black male, short hair, not – little bit slight in physique…not really big" with Ms. Stevens at the clinic. 1&2 RP 90-91. Ms. Goodenough testified that she heard the young man say to Ms. Stevens, "'I have a right to be here,' '[t]hat's my baby,' [p]hrases like that." 1&2RP 92. Ms. Goodenough thought that it looked like the male and Ms. Stevens were together, that Ms. Stevens "seemed very bothered by his presence… seemed nervous, upset" and the young man with her had a "confrontational and combative" demeanor. 1&2RP 91.

When the State asked Ms. Goodenough if she saw anyone in the courtroom, Ms. Goodenough pointed out defendant and described his suit. 1&2RP 93. Defendant made no objections during the State's closing arguments. 1&2RP 107-117. On cross-examination by defense, Ms. Goodenough indicated that defendant looked familiar to her now but she didn't want to say for sure because it had been almost a year since the incident. 1&2RP 94.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW ANY IMPROPER ARGUMENT OR ONE SO PREJUDICIAL THAT IT COULD NOT BE CURED BY AN INSTRUCTION.

To prevail on a claim of prosecutorial error[1], a defendant must show the prosecutor's conduct was both improper and had a prejudicial effect. ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

a. The prosecutor's statements during closing argument were proper.

Any statements alleged to be improper are viewed within the context of the record and circumstances of the trial. ***Dhaliwal***, 150 Wn.2d at 578. "Counsel are permitted latitude to argue the facts in evidence and

[1] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorney's Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.*, ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

reasonable inferences in their closing arguments." ***Dhaliwal***, 150 Wn.2d at 577 (quoting ***State v. Smith***, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985)).

During closing arguments relating to Ms. Goodenough, the prosecutor said:

> Valerie Goodenough testified that he [sic] she saw Ms. Stevens at MultiCare. She knows Ms. Stevens. She's a patient there. She's seen her before. She knows Ms. Stevens. She doesn't know the person that was with her. She'd never seen him before, but she described the person that she saw, very striking resemblance to the defendant. And she saw the two of them were clearly together, that Beth didn't want him there and that he was aggressive. So she saw the contact between the two of them there on that day at MultiCare.
>
> She also heard statements that indicate that she saw the defendant there that day, that I have a right to be here and that's my baby, which correlates to what Ms. Stevens said, that she was pregnant, she was there for her pregnancy and the defendant would not go away.
>
> ... Valerie Goodenough told you that she observed Bethany that day. She had seen Bethany before and that Bethany looked scared and upset that day.

1&2RP 110, 114.

Ms. Stevens knows and identified the defendant. Ms. Goodenough, while she wasn't familiar with the defendant, did hear the statements he made to Ms. Stevens, corroborating Ms. Stevens' testimony. From this evidence, the prosecutor properly drew logical conclusions.

The alleged improper comments in this case do not fall within the scope of what courts have generally held to be improper. ***Dhaliwal***, 150 Wn.2d at 577-78 (personal beliefs about the defendant's guilt or innocence

are improper); *see* ***State v. Sakellis***, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011); *see also* ***State v. Emery***, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (arguments requiring the jury to "fill-in-the-blank" are improper); ***In re Cross***, 180 Wn.2d 664, 724-25, 327 P.3d 660 (2014) (irrelevant arguments intended to appeal to the passion or prejudice of the jury are improper).

Arguments which encourage a jury to render a verdict based on facts not in evidence are improper. ***State v. O'Neal***, 126 Wn. App. 395, 421, 109 P.3d 429 (2005). However, language used in reciting the facts need not exactly track the language presented as evidence to be considered supported by the evidence. ***O'Neal***, 126 Wn. App. at 421 (prosecutor's comments that defendant had "binoculars" during closing did not match the evidence produced during trial that defendant had "night goggles," yet was held to be proper because the evidence supported the argument).

The prosecutor argued that Ms. Goodenough "described the person that she saw, very striking resemblance to the defendant," making an inference from Ms. Goodenough's description of the man with Ms. Stevens as a "young black male, short hair . . . little bit slight in physique . . . not really big" as having a very striking resemblance to the defendant. 1&2RP 110, 91. This was not a recitation of Ms. Goodenough's testimony word for word, it was a summary of the evidence. As in ***O'Neal***, the wording in closing arguments here need not track the exact wording of Ms. Goodenough's testimony; this was not a direct quote.

When taken in context of the trial, all of the evidence, and the surrounding statements from the prosecutor regarding Ms. Goodenough's familiarity with Ms. Stevens, the inference that the description bore a very striking resemblance to the defendant is an obvious one. Ms. Goodenough not only described the appearance of the man with Ms. Stevens, Ms. Goodenough also confirmed she heard statements he made that are consistent with the identification of the defendant; "that's my baby." 1&2RP 92. Ms. Stevens had testified on June 10, 2015 that she has a nine-month-old daughter with the defendant, the timing of which is consistent with her pregnancy at the time of the incident. 1&2RP 38.

An argument based on common sense which does not purport to quote from the evidence is not introducing facts not in evidence. *See* ***State v. Barrow***, 60 Wn. App. 869, 873-74, 809 P.2d 209 (1991) (Prosecutor's argument in closing, "You heard the officers testify they've been doing these buy busts for close to two years . . . It's a criminal deal, and anybody knows that if you don't want to get caught, you don't carry more than you absolutely have to," was not improper but based on common sense); *see also* ***State v. Hartzell***, 156 Wn. App. 918, 943, 237 P.3d 928 (2010) (Comment that a mother would try to help her defendant son by testifying did not imply facts not in evidence because it was not quoting from evidence that was not admitted). Similarly, the prosecutor in categorizing Ms. Goodenough's description as a very striking resemblance to the defendant was making a common sense argument, and not indicating a

quote from Ms. Goodenough. The jury heard, through admitted evidence, Ms. Goodenough's description of defendant and could see for themselves whether or not he fit such a description as he sat in the courtroom.

The context of the record and circumstances of the trial show that the prosecutor's statements during closing are supported by evidence, unlike cases in which courts have found the prosecutor to be arguing facts not in evidence. *See* ***State v. Pierce***, 169 Wn. App. 533, 554, 280 P.3d 1158 (2012) (prosecutor's argument giving an opinion about the "victims thoughts before his death" were not in evidence and thus improper); *see also* ***State v. Warren***, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (prosecutor's comments regarding delayed disclosure in child victims of sexual abuse were improper when not introduced into evidence via expert testimony); *see also* ***State v. Jones***, 144 Wn. App. 284, 293-94, 183 P.3d 307 (2008) (prosecutor's argument that police would suffer professional repercussions if they used an untrustworthy informant and would have discontinued using one if they doubted his trustworthiness was an improper argument based on facts not in evidence).

The prosecutor's statements during closing arguments were proper, in which common sense inferences were made from the evidence and testimony presented at trial.

b. Where defendant failed to object, defendant has failed to show the prosecutor's statements during closing argument were so flagrant and ill-intentioned that they could not be cured with a jury instruction if they were found to be improper.

Where defendant fails to object at trial, defendant on appeal must establish the prosecutor's argument was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" that cannot be cured by a jury instruction. ***State v. Sakellis***, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011) (citing ***State v. Gregory***, 158 Wn.2d 759, 841, 147 P.3d1201 (2006)). "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." ***Emery***, 174 Wn.2d at 762 (citing ***State v. Weber***, 159 Wn.2d 252, 271-72, P.3d 646 (2006)). The focus should be placed more on whether the alleged error resulted in prejudice that cannot be cured by an instruction and less on whether the error was flagrant or ill intentioned. ***Emery***, 174 Wn.2d at 762. To show prejudice, the defendant must show a substantial likelihood that the alleged improper statements affected the jury's verdict. ***Dhaliwal***, 150 Wn.2d at 578 (quoting ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

Defendant did not object to the statements made by the prosecutor that defendant now, on appeal, argues are improper. 1&2RP 110, 132-33;

Brief of App. 5. Instead, defense counsel chose to address the State's argument in his own closing. (See argument in section two.)

The jury in this case was correctly instructed to only consider testimony they heard from witnesses, stipulations, and admitted exhibits. CP 65. The jury was also instructed the lawyers' statements are not evidence and that they (the jurors) were to disregard any remark, statement, or argument that was not supported by the evidence. CP 66. A jury is presumed to follow the court's instructions. ***State v. Lamar***, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Any prejudice resulting from the prosecutor's statements regarding Ms. Goodenough during closing would be minimized by these instructions to the jury. *See*, ***State v. Perkins***, 97 Wn. App. 453, 460, 983 P.2d 1177 (1999) (holding any prejudice from prosecutor's argument that the amount of drugs found on the defendant is an amount unlikely to be left unattended was minimized by jury instructions to disregard remarks unsupported by evidence).

Even if the statements made by the prosecutor did misquote Ms. Goodenough, as defendant suggests, simply misquoting a witness does not rise to the level of prejudice that would require a new trial. ***State v. Turner***, 167 Wn. App. 871, 883, 275 P.3d 356 (2012) (prosecutor incorrectly stating that defendant said, "[Y]ou want to die, Old Man," was not prejudicial). Also, an instruction could have been given to the jury reminding them, as previously instructed, that the lawyers' statements are

not evidence; that the jury is to rely only on the witness testimony and admitted evidence in reaching a verdict.

Even if improper, defendant cannot show that these particular statements made by the prosecutor during closing regarding Ms. Goodenough were solely responsible for the jury's verdict. The State provided ample testimony and evidence, in addition to Ms. Goodenough's testimony, sufficient to prove its case. The State was required to prove defendant knew there was a no-contact order in effect, that he knowingly violated a provision of that order, and that he had twice previously been convicted for violating the provisions of a court order. CP 76.

Along with the testimony of Ms. Stevens and Officer Lorberau, which confirmed the existence of the no-contact order in effect at the time defendant contacted Ms. Stevens at MultiCare, the no-contact order itself was admitted as evidence to be considered by the jury. 1&2RP 40-41, 58-60. The State submitted evidence showing defendant knew there was a no-contact order in place; defendant's signature was on the no-contact order. Above all, Ms. Stevens identified the defendant, with whom she had had a relationship and a child, contacted her. 1&2RP 41. Also, that he was present at the time the no-contact order was entered. 1&2RP 58-59. Defendant clearly knew he was within 500 feet of Ms. Stevens and talking with her, both of which are prohibited by the no-contact order. Ms. Stevens even warned him at the time of contact that he needed to leave or he would get in trouble. 1&2RP 42. The State also submitted evidence of

defendant's prior convictions for violating the provisions of a court order when it presented certified copies of those convictions which were admitted into evidence. 1&2RP 101-102.

The State's argument was proper. Not only this, but defendant failed to object to any of the statements made during closing arguments. As a result, defendant's burden on appeal requires him to show that the argument was so flagrant and ill-intentioned they could not have been cured by an instruction. He fails to do so.

2. DEFENDANT HAS FAILED TO SHOW DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT DEFENDANT WAS PREJUDICED BY DEFICIENCY.

A claim of ineffective assistance of counsel arises from a defendant's right to counsel under the Sixth Amendment to the United States Constitution. *See*, ***Strickland v. Washington***, 466 U.S. 668, 685-87, 80 L.Ed.2d 674 (1984). The purpose of examination of counsel's performance is to ensure that criminal defendants receive a fair trial. *Id.* at 684. To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by the deficient performance. ***In re Crace***, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing ***Strickland***, 466 U.S. at 668).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). "The defendant alleging ineffective assistance of counsel 'must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" ***In re Personal Restraint of Elmore***, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007) (quoting ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

There is a strong presumption that counsel provided adequate assistance and "made all significant decisions in the exercise of reasonably professional judgment." ***State v. Strange***, 188 Wn. App. 679, 688, 354 P.3d 917 (2015) (quoting ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991)). The presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. ***Ciskie***, 110 Wn.2d at 284. However, failure to object to the State's comments during closing arguments generally does not constitute deficient performance because it is uncommon to object during closing arguments "absent egregious misstatements." ***In re Cross***, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (quoting ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 717, 101 P.3d 1 (2004)).

Deficient performance prejudices a defendant when there is a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. ***McFarland***, 127 Wn.2d at 335.

When the record is viewed as a whole, counsel's performance was far from deficient. During the State's case in chief, defense counsel thoroughly cross examined all of the State's witnesses, pointing out any inconsistencies in testimony. 1&2RP 45-48, 51-52, 63-66, 75-78, 94-100. During cross examination of Ms. Goodenough, defense counsel specifically challenged her recollection of defendant. Defense counsel made objections to a speculative question posed by the State and the admission of Ms. Stevens' identification card and docket entries of defendant's prior conviction. 1&2RP 41, 61, 14.

Furthermore, defense counsel's decision not to object during the prosecutor's closing argument was likely part of a larger trial strategy. Defense counsel probably recognized that the State's argument was proper. Also, he may have chosen not to object to the State's comments regarding Ms. Goodenough in order to challenge the State's argument in his own closing. He stated:

> So Ms. Goodenough said, well, whoever was there I hadn't seen them before, I don't remember ever seeing him before. And the State testified in their closing that she didn't know the suspect but he bore a striking resemblance to the defendant. I don't remember her saying he bore a striking resemblance. What constitutes a striking resemblance? Her testimony was that he was a young black male, slight build.

> How does that constitute a striking resemblance to the defendant?

1&2RP 125.

Defense counsel countered the State's argument by calling into doubt that Ms. Goodenough's description of the defendant could be considered a "striking resemblance." He told the jury to rely on their notes and their memory with regard to witness testimony. 1&2RP 126. His decision not to object was part of a larger strategy to challenge the State's witnesses in his own closing.

Even if defense counsel's performance was deficient for failing to object during the prosecutor's closing argument, defendant is unable to show he was prejudiced by such inaction as required under the second prong of the ***Strickland*** test. For much of the same reasons discussed in the preceding section, defendant cannot show prejudice from failure to object because the State provided overwhelming evidence to prove its case. Additionally, as discussed above, defense counsel responded to the State's comments by calling into question the testimony of Ms. Goodenough and instructing the jury to rely on their own notes and memory of it. The jury was repeatedly reminded to consider only the testimony and evidence that was presented during the trial and the law as instructed by the court.

All of this reflects that even if the failure to object was deficient, defendant cannot show how he was prejudiced by it. He is unable to satisfy either the first or second prong of the ***Strickland*** test.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: April 11, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Stacy Norton
Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.11.16
Date Signature

PIERCE COUNTY PROSECUTOR

April 11, 2016 - 4:00 PM

Transmittal Letter

Document Uploaded: 1-477645-Respondent's Brief.pdf

Case Name: State v. Fresnel Williams

Court of Appeals Case Number: 47764-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

liseellnerlaw@comcast.net